

DECISION



20278
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-210345

DATE: May 31, 1983

MATTER OF: Columbia Diagnostics, Inc.

DIGEST:

1. Where Federal Supply Schedule is not mandatory on agency, contracting officer is not precluded from issuing IFB for items, and determination whether to proceed with solicitation is a business judgment for the contracting officer which GAO will not question absent a clear showing of abuse of discretion.
2. Prohibition contained in 41 C.F.R. § 101-26.401(a) (1982), that agencies shall not seek alternate sources to Federal Supply Schedule (FSS), is applicable only where FSS is mandatory.

Columbia Diagnostics, Inc. (CDI), protests the decision of the National Institutes of Health (NIH) to award contracts for five items of laboratory glassware under invitation for bids (IFB) No. 263-83-B(86)-0015.

CDI contends that these awards are improper because these contracts allegedly violate the protester's current Federal Supply Schedule (FSS) contract.

We deny the protest.

The NIH IFB for miscellaneous laboratory glassware for a 12-month period beginning from date of contract award was issued on December 2, 1982, with bid opening on January 3, 1983. On December 29, 1982, CDI filed a protest asserting that NIH could not legally solicit bids for five of the 29 items specified in the IFB because these five items were covered by an existing FSS contract under which CDI was the contractor. CDI alleged that in addition to this FSS contract (1983 FSS), which covered the period April 6, 1982, to February 28, 1983, the NIH IFB was also inconsistent with a General Services Administration (GSA) solicitation issued for FSS contracts covering March 1, 1983, to February 28,

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1984 (1984 FSS). CDI contended that, since the five items involved in this protest were already covered and would continue to be covered by valid FSS multiple-award contracts during the contractual period contemplated by NIH's IFB, any awards under the NIH IFB were improper.

NIH responds that it was not a mandatory user agency under the 1983 FSS, that there was no legal requirement that NIH purchase from the schedule, and NIH therefore could solicit bids competitively. NIH also contends it was not required to cancel this IFB because of the possibility that it could conflict with the mandatory 1984 FSS to be awarded on an unspecified future date. NIH states that it was not required "by law or logic" to curtail the acquisition of needed supplies in anticipation of the award of a contract by another executive agency "the timing of which can be neither accurately predicted nor controlled."

On April 15, 1983, GSA awarded an FSS contract covering these five items. However, the effective dates for these FSS items were May 1 and/or May 15. On April 29, 1983, prior to the effective date of the 1984 FSS, NIH awarded contracts for the five items. NIH reports that the prices it obtained are lower than CDI's 1984 FSS prices.

CDI argues that NIH's action was improper as a matter of law and contrary to the spirit underlying the scheme of FSS contracting. CDI points out that NIH was on notice that the 1984 FSS contract had been awarded and within 2 weeks would be effective for all five items, but NIH "raced" to award under its IFB prior to the effective date of the 1984 FSS. CDI also argues that NIH improperly compared prices received under the IFB with those under the FSS contract, a procedure it contends is prohibited by the Federal Procurement Regulations (FPR) governing the FSS.

There was no impropriety in the NIH award under the IFB. Our Office has stated that, where items are available on a nonmandatory FSS, as was the case here, a contracting officer is not precluded from issuing an IFB for these items. The determination whether to proceed with a solicitation in order to obtain a more favorable price is basically a business judgment which our Office will not question absent a clear showing of abuse of discretion. See AMRAY Inc., B-210490, February 7, 1983, 83-1 CPD 135; Fire Apparatus Service, B-192370, August 22, 1979, 79-2 CPD 142.

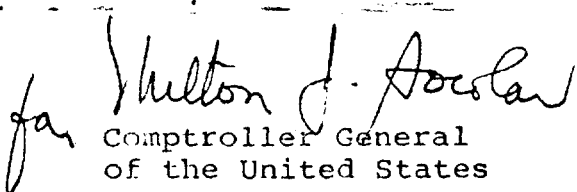
Here, 16 bids were submitted in response to the IFB. Lower prices were obtained in comparison to both the 1983 and 1984 FSS. The IFB was issued approximately 4 months before award was made under the mandatory FSS. We know of no regulation or decision which requires that an agency delay issuance of an IFB because of the intended future award of a mandatory FSS contract. Thus, although NIH was on notice after the protest that GSA intended to make a mandatory FSS for 1984, in our view, NIH was not required to terminate its procurement.

While CDI argues that NIH took advantage of a technicality, the delay in the effective date of the 1984 FSS, to award contracts for these items to avoid use of the 1984 mandatory FSS, NIH points out in its report that its issuance of an IFB was based on its decision not to anticipate award of a contract by GSA the timing of which it could not predict or control and was initiated well in advance of the award of the 1984 FSS. In our view, NIH's decision to conduct a procurement under these circumstances and to award contracts under the IFB, instead of cancelling the IFB and using the FSS once it became effective, does not constitute an abuse of discretion on the part of NIH.

CDI also argues that NIH's price comparison of the IFB and the FSS contracts is prohibited by 41 C.F.R. § 101-26.401(a) (1982), which states:

"* * * Agencies shall not solicit bids, proposals, quotations or otherwise test the market for the purpose of seeking alternative sources to Federal Supply Schedules. * * *"

However, this FPR provision, of which only part is quoted above, "merely provides that agencies shall not seek alternate sources to a mandatory Federal Supply Schedule." See Stanley and Rack, B-204565, March 9, 1982, 82-1 CPD 217. Here, at the time NIH conducted the price comparison, no mandatory FSS was applicable to NIH and, therefore, NIH did not violate this regulation.

for 
Comptroller General
of the United States